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No. 02-215

IN THE

Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' BRIEF

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QUESTION PRESENTED

Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement when that agreement contains limitations on statutorily available remedies.

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiffs-appellees Jeffrey Book, D.O., Dennis Breen, M.D., Michael Burgess, M.D., Edward L. Davis, D.O., Glenn L. Kelly, M.D., Manual Porth, M.D., and Charles B. Shane, M.D., and (b) defendants-appellants Foundation Health Systems, Inc., n/k/a Health Net, Inc., PacifiCare Health Systems, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f/k/a United HealthCare Corporation, UnitedHealthcare, Inc., and WellPoint Health Networks Inc. This brief on the merits is being filed on behalf of petitioners UnitedHealth Group Incorporated, UnitedHealthcare, Inc., PacifiCare Health Systems, Inc., and PacifiCare Operations, Inc. The corporate disclosure statement for these entities is contained in the petition for writ of certiorari and is incorporated by reference. No amendments to that statement are needed to make the statement current.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' BRIEF

Petitioners respectfully request the Court to reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A10) is reported at 285 F.3d 971. The relevant decisions of the district court (Pet. App. A11-A46, A47-A54) are reported at 143 F.Supp.2d 1371 and 132 F.Supp.2d 989.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254(1). The court of appeals issued its judgment on March 14, 2002, and denied a petition for rehearing or rehearing *en banc* on June 21, 2002. Pet. App. A55-A56. Petitioners timely filed their petition for writ of certiorari on August 6, 2002.

FEDERAL STATUTES INVOLVED

This case involves §§2, 4, 10, and 11 of the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq.*, and §1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.* The text of these provisions is set out in the appendix to this brief.

STATEMENT

This case is a consolidated multi-district litigation that was initially filed by a group of physicians accusing managed health care organizations, with whom they had contracted, of not properly paying claims they had submitted. This lawsuit was brought in violation of the physicians' arbitration agreements, and they have concomitantly sought to expand the litigation by effectively nullifying the application of thousands of arbitration agreements by which physicians have contractually bound themselves to resolve their disputes through arbitral proceedings.[1]

United and PacifiCare process hundreds of millions of claims each year, and it is inevitable that disputes occasionally will arise with physicians regarding the disposition of some of those claims. Given the sheer volume of claims, it is essential for petitioners to have an effective dispute resolution mechanism that appropriately balances the parties' interests in fairness and efficiency. To that end, petitioners have internal grievance processes that address physician complaints about the treatment of claims. Issues that are not resolved at that level may be submitted to internal appeals processes. A physician may initiate an arbitration proceeding to resolve any remaining issues only when neither

[1] Subsequent to the orders that are the subject of this proceeding, the district court certified a nationwide plaintiff class of approximately 600,000 physicians. The court of appeals has granted a Rule 23(f) petition to review that decision, and issues relating to class treatment of arbitrable claims are not currently before the Court.

the grievance process nor the appeals process is successful. Typically, physicians who contract with United and PacifiCare execute an agreement to handle their disputes through this nonlitigation mechanism.

In addition to their vast superiority in efficiency, petitioners' grievance-appeal-arbitration processes also control litigation costs, ensuring a cost-effective means of resolving disputes without many of the costs and risks associated with prolonged litigation. The cost of litigating with a physician over even a single claim can be onerous, and the risk of jury verdicts far out of proportion to the amount of the claim is substantial. As the Court has cogently observed, "The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming . . . ."[2]

Respondents Glenn Kelly, M.D., and Manual Porth, M.D., individually or as members of larger physician groups, entered into physician agreements with United. Those agreements contained arbitration provisions under which Drs. Kelly and Porth agreed to submit "any disputes about their business relationship" with United "to binding arbitration." J.A.168, 212. Each agreement also sought to limit any arbitration award of punitive or exemplary damages. J.A.168, 212 (Dr. Kelly's arbitration agreement with United limited the arbitrator's ability to award "punitive or exemplary damages"); J.A.212 (Dr. Porth's arbitration agreement with United limited the arbitrator's ability to award "extracontractual damages of any kind, including punitive or exemplary damages"); J.A.168.

Respondents Jeffrey Book, D.O., and Dennis Breen, M.D., individually or as members of larger physician groups, were similarly bound by their physician contracts to arbitrate

[2] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747 (1981) (Burger, C. J., dissenting).

disputes with PacifiCare.[3] The PacifiCare agreements required Drs. Book and Breen to arbitrate "any controversy" "arising out of" their respective agreements, and further stated that the "arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by [State] law, except that punitive damages shall not be awarded." J.A.84, 106-07, 146-47.

Respondents disregarded their contractual commitments to arbitrate when they sued petitioners and others on August 14, 2000. R.167.1.[4] Respondents claimed to be "victims of a scheme implemented by Defendants in violation of the Racketeer Influenced and Corrupt Organization Act (RICO)," *id.*, at 2, and they also alleged various other federal and state-law causes of action, including claims for breach of contract and quantum meruit. The defendants, including petitioners, timely moved the district court to compel respondents to arbitrate all of their claims. *See* R.320.6-7; R.421.6-7; R.583.11-16, 18.

The district court granted in part and denied in part the various defendants' motions to compel arbitration. *See In re Managed Care Litig.*, 132 F.Supp.2d 989, 992 (S.D. Fla. 2000). The district court held that petitioners' arbitration agreements were generally enforceable and sufficiently broad to encompass respondents' claims against petitioners.[5] But,

[3] Breen is not a named plaintiff in the most recent amended complaint, but he is a member of the certified class and is still the subject of an order granting and denying arbitration, on which the Court granted a writ of certiorari. Moreover, respondents are seeking leave to file another amended complaint that does list Breen as a named plaintiff.

[4] Citations to the underlying record will reference the docket number and relevant page numbers.

[5] The district court correctly held that so long as respondents' "allegations 'touch matters' covered by the arbitration agreement, then those claims must be arbitrated, irrespective of how the allegations are labeled." *In re Managed Care Litig.*, 132 F.Supp.2d, at 993. The district court held that respondents' allegations (including their RICO allegations)

while recognizing that RICO claims are subject to arbitration, the district court declined to compel respondents to arbitrate their RICO claims because it held that they could not obtain "meaningful relief" in arbitration on those claims as a result of the damage limitation provisions. *Id.*, at 1000-01, 1005. Rather than limiting its review to questions of arbitrability, the district court chose to examine the arbitration agreements' damage limitation provisions; interpreted those provisions to preclude an award of RICO treble damages (even though no provision expressly says that); and held that, because the damage limitation provisions did not permit "meaningful relief" in arbitration, respondents would be completely relieved of their obligation to arbitrate their RICO claims. *Id.*; *see also In re Managed Care Litig.*, 143 F.Supp.2d 1311, 1375 (S.D. Fla. 2001).

The court of appeals affirmed the district court's holding that respondents were not required to arbitrate their RICO claims because they could not obtain RICO treble damages in arbitration. *See In re Humana Managed Care Litig.*, 285 F.3d 971, 973-74 (CA11 2002) ("We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F.Supp.2d 989 (S.D. Fla. 2000).").

SUMMARY OF ARGUMENT

The Court should reject the lower courts' attempt in this case to significantly enlarge the gatekeeping function that the courts necessarily perform when asked to compel arbitration. The Court has properly limited the courts' function in determining a motion to compel arbitration to determining: (1) whether the parties are bound by an arbitration agreement whose scope covers the parties' dispute, (2) whether under §2

"touch[ed] matters" relating to their arbitration agreements. *Id.*, at 1000 n.3, 1001 n.4, 1005 n.9. Respondents did not dispute those conclusions on appeal.

of the FAA there are grounds at law or equity justifying the revocation of the arbitration agreement, and (3) when a federal statutory claim is asserted, whether Congress has expressed a clear intent that such a claim not be arbitrated at all.

In this case, none of those factors would prevent arbitration, and the Court should not weaken the protections of the FAA by empowering judges to abrogate private arbitration agreements simply by finding fault with previously agreed-upon provisions in those agreements limiting arbitral procedures or remedies. The interpretation and enforcement of those provisions is well within the scope of the arbitrator's contractually assigned role, and those decisions are best made in the first instance by the arbitrator as part of the overall arbitral process. An expansion of the courts' role at the motion-to-compel stage to evaluate the terms under which the parties agreed to arbitrate would upset the contractual expectations of the party seeking arbitration—by shifting to the court determinations intended for the arbitrator—and would severely frustrate the FAA's support for arbitration by significantly delaying the mechanism through which the FAA enforces arbitration. That kind of prearbitration scrutiny also would dramatically expand the limited prearbitration review authorized by §§2 and 4 of the FAA and impinge upon the broader postarbitration review envisioned under §§10 and 11 of the Act. The Court has repeatedly noted that postarbitration review is sufficient to ensure that an arbitrator has complied with the controlling law.

A party who believes that a remedial limitation is not valid may assert that contention before the arbitrator, who is bound to apply controlling law. Allowing district courts to evaluate such provisions in the first instance not only usurps the role

of the arbitrator, but also exhibits a strong distrust of the arbitral process because it improperly presupposes that arbitrators will not, or cannot, correctly apply the law in assessing challenges to remedial limitations in arbitration agreements.

But even assuming that the lower courts could properly undertake to evaluate the damage limitation provisions in petitioners' arbitration agreements at the motion-to-compel stage, those provisions did not impermissibly restrict respondents' RICO remedies in arbitration so as to excuse respondents from arbitrating their RICO claims altogether. RICO treble damages were not intended to be primarily punitive, and even if there were some uncertainty on that account, the strong presumption favoring arbitration should have required the district court to adopt an interpretation of the damage limitation provisions that would permit arbitration. Most importantly, commercial parties may freely contract to restrict available remedies, including extracontractual and punitive damages, whether in an arbitration clause or elsewhere in a contract. And, finally, even if the damage limitation provisions were not themselves enforceable against RICO claims, the proper remedy would have been to restrict the applicability of the damage limitation provisions, not to strike the parties' agreement to arbitrate the RICO claims altogether.

ARGUMENT

I. ARBITRATORS, NOT COURTS, SHOULD ADDRESS THE VALIDITY OF ARBITRAL LIMITATIONS ON REMEDIES IN THE FIRST INSTANCE.

In 1925, Congress enacted what is now known as the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (FAA). The text, legislative history, and consistent judicial interpretation of the FAA illustrate that Congress intended the Act to provide a

legal basis for the enforcement of arbitration agreements that would limit the courts' involvement in the arbitration process.

A. Congress Enacted a Limited Role for Courts in Enforcing Arbitration Agreements.

The FAA was intended to end judicial hostility toward arbitration agreements and to strengthen enforcement of contractual agreements to arbitrate. *Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). At the core of the Act is Congress's belief that agreements to arbitrate are, in and of themselves, "business contracts" that should be enforced by the courts in the same manner as any other business contract would be enforced. "An agreement for arbitration is in its essence a business contract. It differs in no essential [respect] from other commercial agreements. It should stand upon the same plane and be regarded by the law in the same light . . . ." *Arbitration of Interstate Commercial Disputes, Joint Hearings Before the Subcomms. of the Comms. on the Judiciary, Congress of the United States, on S. 1005 and H.R. 646*, 68th Cong. 38 (1924).

Congress's mandate that courts end their historical hostility toward arbitration and treat arbitration agreements like other commercial or business contracts is clear from the language of the FAA, and in particular §2, the "primary substantive provision" of the FAA. *See Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. §2 (emphasis added). That section declares "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24; *see Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625

(1985) ("The 'liberal federal policy favoring arbitration agreements' manifested by [§2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . .") (internal citations omitted).

In enacting §2, Congress sought to end the days when a party could agree to arbitrate a dispute according to specific terms and then, having the dispute come to fruition, change its mind and simply walk away from the agreement without repercussion. *See* H.R. REP. NO. 68-96, at 2 (1924). Absent a valid defense to the core agreement to arbitrate, like fraud, duress, mistake, or other common-law contract defenses, Congress intended arbitration agreements to be enforced like other contracts. *See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Congress did not want parties objecting to arbitration to be able to force lengthy court proceedings, at great expense, over whether they have to arbitrate. On the contrary, the FAA was designed to reflect a "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 23. A party should not be permitted "to ignore the [arbitration] contract and resort to the courts" precisely because "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984); *see also Moses H. Cone Mem'l Hosp.*, 460 U.S., at 22 ("Congress' clear intent" in the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"); *Prima Paint*, 388 U.S., at 404 (discussing the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

To achieve swift resolution of controversies regarding the enforcement of an arbitration agreement, Congress indicated

that a court's role in reviewing an arbitration agreement should be limited to examining (1) whether the dispute is within the scope of the parties' arbitration agreement; (2) whether the agreement to arbitrate is revocable on grounds at law or in equity; and (3) when one of the parties asserts a federal statutory claim, whether Congress has clearly expressed an intent that the statutory claim not be arbitrated. *See Mitsubishi*, 473 U.S., at 628; *Southland Corp.*, 465 U.S., at 10-11.

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement." 9 U.S.C. §4.

Congress wanted arbitrators, not courts, to hear and determine any issues beyond challenges to the making or scope of arbitration agreements. Because "arbitration is strictly a matter of contract, the parties to an arbitration agreement [are] 'at liberty to choose the terms under which they will arbitrate.'" *Volt Info. Sciences, Inc.* v. *Bd. of Trustees*, 489 U.S. 468, 472 (1989) (citations omitted).

Courts can give effect to this important federal policy favoring arbitration only by refraining—at the motion-to-compel stage—from additional inquiries into the meaning and significance of procedural or remedial limitations in an otherwise enforceable arbitration agreement and leaving those determinations to the arbitrator in the first instance. Unless the party objecting to arbitration can establish that the arbitration agreement may be revoked under §2 or that Congress has categorically expressed its intent that certain federal statutory claims not be arbitrable, the court should enforce the agreement according to its terms.

1. *The FAA Inquiry: Did the Parties Agree To Arbitrate the Dispute at Issue and Is the Arbitration Agreement Revocable?*

"[T]he question of arbitrability—whether the [arbitration agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Techns., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986). Because arbitration is "a matter of contract between the parties," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995), a court asked to compel arbitration of a dispute must first "determine whether the parties agreed to arbitrate that dispute." *Mitsubishi*, 473 U.S., at 626; *see EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Because the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements,' we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.") (internal citation omitted). The parties' intentions control that determination, "but those intentions are generously construed as to issues of arbitrability." *Mitsubishi*, 473 U.S., at 626. "An order to arbitrate the particular [dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am.* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960).

There is no question that respondents' RICO claims are within the scope of their arbitration agreements. The agreements plainly state that they will arbitrate "any disputes about their business relationship" with United and "[a]ny controversy" or "claim arising out of" their agreements with PacifiCare. J.A.84, 106, 146, 168, 212. The district court specifically held—and respondents have not disputed in this Court—that the parties' arbitration agreements reached the RICO claims. *See In re Managed Care Litig.*, 143

F.Supp.2d, at 1375; *In re Managed Care Litig.*, 132 F.Supp.2d., at 994, 1000 n.3, 1001 n.4.[6]

Nor is there any dispute in this case about §2 revocation issues. Neither of the lower courts found that the arbitration agreements could be revoked on §2 grounds. To the contrary, the lower courts both upheld the arbitration agreements themselves, and the district court ordered respondents to arbitrate various claims under their respective arbitration agreements. Thus, the issue in this particular case is not whether the arbitration agreements could be revoked under §2. Instead, the issue is solely whether the district court could refuse to order arbitration of respondents' RICO claims based on perceived inadequacies in the damage limitation provisions.

2. *The Final Inquiry: Did Congress Intend To Preclude Arbitration of the Statutory Claims at Issue?*

Ordinarily the inquiry would conclude with the recognition that the parties irrevocably agreed to arbitrate a dispute within the scope of a valid agreement. *See Waffle House*, 534 U.S., at 294 & n.9. The Court has acknowledged, however, that Congress can, if it desires, preclude the arbitration of certain statutory claims. *Mitsubishi* formally recognized that Congress can make claims under a particular statute nonarbitrable, notwithstanding the FAA. 473 U.S., at 625-28. The Court emphasized, however, that it will not lightly conclude that Congress intended to preclude arbitration, but instead will assume that Congress intends statutory claims to

[6] Another arbitration case currently pending before the Court, *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800 (argued Oct. 9, 2002), also involves a "who decides" issue. But *Howsam* raises serious questions about the scope of the parties' agreement to arbitrate that do not exist in this case. The lower courts in this case determined that respondents clearly agreed to arbitrate their disputes with United and PacifiCare.

be arbitrable unless Congress itself has evinced in the statute's text or legislative history an intention to preclude arbitration, *id.*, at 628, or there is an inherent conflict that puts arbitration at odds with the statute's underlying purposes. *See Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987). When statutory claims are at issue, the *final* part of the court's motion-to-compel inquiry is whether Congress has expressly precluded arbitration of the statutory cause of action at issue. *Mitsubishi*, 473 U.S., at 628; *see Green Tree Fin. Corp.—Ala.* v. *Randolph*, 531 U.S. 79, 90 (2000).

The Court's prior decisions in this area have repeatedly focused on whether Congress categorically intended to exempt certain statutory claims from arbitration. *See Mitsubishi*, 473 U.S., at 627 ("[I]t is the congressional intention expressed in some other statute on which the courts must rely to identify any *category of claims* as to which agreements to arbitrate will be held unenforceable.") (emphasis added); *id.*, at 628 ("if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history"). Consistent with that view, the Court has determined that parties may effectively vindicate in arbitration causes of action created by the Securities Act, the Securities Exchange Act, RICO,[7] the Sherman Act, and the Age Discrimination in Employment Act of 1967. *See Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989); *McMahon*, 482 U.S., at 242; *Mitsubishi*, 473 U.S., at 637, 640; *Gilmer*, 500 U.S., at 25, 28.

[7] *McMahon* addressed the arbitrability of RICO claims and held that they are arbitrable. *See* 482 U.S., at 238 ("There is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act."); *id.* ("There is no hint in [the] legislative debates that Congress intended for RICO treble-damages claims to be excluded from the ambit of the Arbitration Act.").

Respondents' "effective vindication" or "meaningful relief" argument does not relate to the categorical arbitrability of RICO claims, but instead is an attempt to inappropriately extend the Court's categorical, statute-level review to specific arbitral procedures or remedies agreed to by the parties. In the face of the FAA's statutory text and the policy concerns requiring limited review at the motion-to-compel stage, respondents want the courts to independently review, before arbitration, the agreed-upon terms of the arbitration agreement to ensure that the parties have not limited the respondents' ability to obtain all statutorily authorized remedies. None of the Court's cases, however, permit a court to consider free-ranging "effective vindication" claims separate from the categorical review of statutory rights or traditional §2 revocation analysis.[8] "At this interlocutory

[8] In *Green Tree*, the Court refused to allow a plaintiff to avoid arbitration of her Truth in Lending Act (TILA) claims even though she argued that her "arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her [TILA] claims in an arbitral forum." 531 U.S., at 90. The Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in an arbitral forum," *id.*, but then held that the plaintiff had failed to carry *her* burden of proving "that arbitration would be prohibitively expensive." *Id.*, at 92. The cost-of-arbitration issue in *Green Tree* had nothing to do with what procedures should be utilized, or what statutory remedies should be afforded, in arbitration. Rather, the Court in *Green Tree*, citing 9 U.S.C. §2, *id.*, at 89, focused on whether a party can avoid arbitration if she can prove that she will be cut off from access to any dispute-resolution forum altogether due to the high costs of arbitration. *See id.*, at 92 (a party has the burden to make a showing of "prohibitive expense" to avoid arbitration); *id.*, at 93 (Ginsburg, J., concurring and dissenting) (the question of "is the arbitral forum *adequate* to adjudicate the claims at issue" is distinct from the question of "is that forum *accessible* to the party resisting arbitration") (emphasis in original). *Cf. The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (stating that a party can invalidate a choice-of-forum clause if "the contractual forum will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of his day in court"). The Court's resolution of the issue was consistent with its traditional §2 revocation analysis and its categorical review of statutory rights.

stage it is not established what law the arbitrators will apply to [respondents'] claims or that [respondents] will receive diminished protection as a result." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *accord id.*, at 542 (O'Connor, J., concurring in the judgment).

Respondents cannot reasonably assert that the terms of their arbitration agreements completely foreclose their statutory remedies for the alleged RICO violations. But, in any event, and for the reasons that follow, permitting prearbitration court review of consensual partial restrictions on statutory remedies would dramatically alter the Court's established motion-to-compel analysis and seriously weaken the Court's long-standing support for arbitration under the FAA.

B. Congress Intended Arbitrators To Address Questions Regarding the Availability of Remedies in the First Instance.

Once a court has determined that the parties have contractually agreed to arbitrate the statutory claims and that Congress has not barred arbitration of those claims, no further inquiry is required or permitted under §2 or §4 of the FAA, and the court should compel arbitration. In this case, respondents do not dispute that their RICO claims are generally arbitrable; rather they assert only that the damage limitation provisions to which they agreed are improper. Those allegedly invalid damage limitation provisions, respondents argue and the courts below held, render their agreements to arbitrate unenforceable as to their RICO claims. To get to that result, respondents had to ask the

district court to: (1) bypass the general arbitrability issue; (2) interpret the damage limitation provisions and declare them improper as a matter of law; (3) speculatively conclude that the arbitrator would not properly apply the law to the provisions (which is inherent in the district court's declaration that respondents could not obtain "meaningful relief"); (4) reject all of petitioners' defenses of the damage limitation provisions; and (5) then finally rule that the invalidity of the damage limitation provisions somehow invalidated the entire arbitration agreement as to the RICO claims independent of any known §2 grounds.

In essence, the district court interpreted and made substantive determinations, not about the scope of what the parties agreed to arbitrate, but about the merits of the matters that the parties indisputably agreed to arbitrate. But that kind of extensive review is precisely what is not supposed to occur at the motion-to-compel stage, not only because it contradicts the text and legislative history of §2 and §4 of the FAA, but also because it ignores the parties' contractual agreement to arbitrate the dispute, usurps the role of the arbitrator, demonstrates a distrust of the arbitral process that the FAA was intended to dispel, and improperly preempts the court's postarbitration review under §10 (grounds for judicial vacatur of an arbitral award) and §11 (grounds for judicial modification or correction of the arbitral award) of the FAA.

Parties ordinarily do not catalog specific causes of action that they want to address through alternative dispute resolution at the time they execute an arbitration agreement; they instead broadly agree, for instance, to arbitrate "any disputes about their business relationship," J.A.168, 212, and contractually agree on the general rules of the arbitration and any remedial limitations that they mutually accept. When parties agree to remedial limitations in an arbitration agreement, they have agreed not only to the limitation itself,

but also to have the limitation applied or interpreted by the arbitrator. *See First Options*, 514 U.S., at 945. "They have 'bargained for' the 'arbitrator's construction' of their agreement." *Eastern Associated Coal Corp.* v. *United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (quoting *United Steelworkers of Am.* v. *Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)); *see Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 509-10 (2001).

In respondents' view, however, when an arbitration agreement limits available remedies, the party asserting a statutory cause of action is entitled to litigate, before arbitration, whether that specific limitation allows "meaningful relief" in arbitration. And, because a plaintiff simply may choose to assert a statutory cause of action, a plaintiff who seeks to avoid arbitration easily may delay or frustrate the arbitration agreement merely by challenging a remedial limitation on the ground that it violates the plaintiff's right to a full statutory remedy. A plaintiff might challenge any number of remedial agreements between the parties, including, for example, an arbitration agreement capping the payment of attorneys' fees, an agreement for liquidated damages, or an agreement otherwise limiting compensatory or punitive damages.

Regardless of the outcome, the mere process of being forced to litigate the meaning and effect of the remedial provisions of the arbitration agreement will effectively deny the nonobjecting party's contractual right to arbitration. *See Southland Corp.*, 465 U.S., at 7 (stating that "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate"); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 558 (1964) (stating that delay in ordering arbitration "may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties"). That process, if endorsed, would eviscerate a party's right to enforce an arbitration

agreement that is otherwise valid under §2 of the FAA and would directly conflict with the Court's directive that "the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'" *McMahon*, 482 U.S., at 226 (internal citations omitted); *see also Moses H. Cone Mem'l Hosp.*, 460 U.S., at 22-23 & n.27; *Prima Paint*, 388 U.S., at 404.

These kinds of disputes should be and are best resolved by the arbitrator in the first instance. The parties contractually committed to allow an arbitrator to resolve the merits of their disputes and award any appropriate remedy that is authorized under the applicable law and in accordance with the arbitration agreement. The arbitrator should resolve challenges to remedial limitations because, in addition to the fact that the parties agreed to it, only the arbitrator can determine on a complete record what, if any, remedies would be appropriate. Inquiring into the potential availability of a particular remedy before the arbitrator has made any determination that the claimant might be entitled to that remedy is purely conjectural and cannot properly justify blocking arbitration of the claim altogether.[9] Instead, once the court determines that the parties have agreed to arbitrate the claim, the court should defer to the arbitrator's role in initially interpreting the terms of the arbitration agreement and applying the controlling law in light of the entire arbitration record.

[9] Indeed, the review undertaken by the district court in this case was far more speculative than the weakness alleged in the arbitration agreement in *Green Tree*. *See* 531 U.S., at 91. The damage limitation provisions used as the basis for excusing respondents from arbitration would have become relevant only if: (1) petitioners did not waive their reliance on the provisions; (2) the arbitrator ruled in respondents' favor; (3) the parties did not settle the dispute; and (4) the arbitrator declined to treble the damages.

The Court for this reason has previously declined to speculate on whether or how provisions in the parties' arbitration agreement would somehow affect the plaintiff's ability to prosecute or recover on her claim in arbitration and has left those questions to the arbitrator in the first instance. In *Mitsubishi*, for example, the Court expressly declined to consider at the motion-to-compel stage a claim that the arbitral panel could potentially apply the wrong law and, accordingly, affect the plaintiff's prosecution of its antitrust claims. 473 U.S., at 637 n.19. The Court recognized that the potential choice-of-law questions were outside the confines of the limited test for arbitrability and, therefore, were for the arbitrator to address in the first instance with the possibility for review by the court at the award-enforcement stage:

> "We therefore have no occasion to speculate on [the law to be applied by the arbitral panel] at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award . . . [T]he national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.*, at 637 n.19, 638.

Building on *Mitsubishi*, the Court in *Vimar Seguros* continued to distinguish between the narrow review permitted before arbitration and the broader postarbitration review in order to define those issues that should be left to the arbitrator in the first instance. Questions regarding what law will apply are to be "decided in the first instance by the arbitrator." 515 U.S., at 541. The Court specifically declined to speculate at the motion-to-compel stage about "what law the arbitrators will apply to petitioner's claims," or about whether "petitioner will receive diminished protection" as a result of the choice-of-law decision. *Id.*, at 540. Those issues were "premature" because "[r]espondents seek only to enforce the arbitration agreement" and the lower court would have the

"'opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed.'" *Id.* (quoting *Mitsubishi*, 473 U.S., at 638).

By limiting its consideration at the motion-to-compel stage to issues related to the making and scope of the arbitration agreement, and by refraining from considerations of whether and to what extent provisions in an agreement may affect the parties' rights and remedies in arbitration, a court does more than just pay lip service to the "emphatic federal policy in favor of arbitral dispute resolution"; rather, it advances that policy and, in turn, satisfies the goals of the FAA. *See Mitsubishi*, 473 U.S., at 631. By contrast, when a court undertakes to evaluate the validity or effect of a provision of the parties' substantive agreement, the court usurps the role of the arbitrator and deprives the parties of the contractual bargain that the FAA was intended to protect. *See W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 764-65 (1983) (parties to an arbitration agreement have bargained to have the arbitrator interpret the contract); *Enter. Wheel & Car Corp.*, 363 U.S., at 599 (same). Even if the arbitrator is free to reinterpret the contractual provisions as part of a subsequent arbitration, the parties will have already litigated in court issues central to the dispute and will have lost forever the efficiency and cost-effectiveness that were part of the arbitration bargain. *See Mitsubishi*, 473 U.S., at 633 ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.").

In addition to improperly substituting the court's judgment for that of the arbitrator, the district court's prearbitration merits review of the parties' damage limitation provisions expresses, at minimum, a "general suspicion of . . . the competence of arbitral tribunals." *McMahon*, 482 U.S., at 231. That suspicion is dramatically revealed in the district

court's conclusion that the unavailability of punitive damages would preclude respondents from effective vindication of their substantive RICO rights in arbitration. That conclusion improperly presumed, first, that the district court was better suited than the arbitrator to interpret the scope of the parties' agreement to limit punitive damages and, second, that the arbitrator would be unable or unwilling to correctly interpret and apply the law to the parties' agreement. It was neither factually credible nor legally permissible for the district court to prognosticate that the arbitrator would not follow controlling law, particularly since all of the arbitration agreements in this case expressly instruct the arbitrator to follow the law. J.A.84, 106-07, 146-47, 168, 212. This Court has repeatedly declined to presume that arbitrators will be incompetent or unwilling to decide the issues placed before them. *See Gilmer*, 500 U.S., at 30; *Mitsubishi*, 473 U.S., at 634. "[W]e have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S., at 232; *see also Gilmer*, 500 U.S., at 32 n.4 (same).

That distrust of the arbitral process improperly led the district court to perform a prearbitration substantive analysis that is both premature and more intrusive than the postarbitration judicial review contemplated by §§10 and 11 of the FAA. Issues of how provisions in an arbitration agreement may affect the parties' rights and remedies in arbitration are outside the scope of a court's motion-to-compel inquiry; they are appropriate for judicial review only at the award-enforcement stage after the arbitrator has addressed them in the first instance.[10] *See Mitsubishi*, 473

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[10] The Court has previously suggested that, on postarbitration review, it would have little hesitation condemning as against public policy agreements whose provisions operate to foreclose completely a party's

U.S., at 637 n.19; *see also John Wiley & Sons*, 376 U.S., at 557.[11] When parties agree to resolve disputes in an arbitral forum, the parties' bargain is not merely to forgo a judicial forum in favor of an arbitral one in the first instance, but necessarily also to conform the scope of judicial review of the arbitral award to the standards provided for in the FAA. *See* 9 U.S.C. §§10-11; *First Options*, 514 U.S., at 942; *cf. Gilmer*, 500 U.S., at 31 ("[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi*, 473 U.S., at 628). In the face of a valid agreement to arbitrate, that review should occur only *after* the parties have gone through the arbitration for which they have bargained. *See, e.g.*, *McMahon*, 482 U.S., at 242 (plaintiffs,

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ability to pursue statutory remedies (as opposed to when remedies may still be available but could simply be affected by the terms of the agreement). *See Mitsubishi*, 473 U.S., at 637 n.19; *Vimar Seguros*, 515 U.S., at 540. That dictum is consistent with a court's authority to refuse to enforce foreign judgments that offend "the public policy of the United States." 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §482(2)(d); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), 21 U.S.T. 2517.

[11] In *John Wiley & Sons*, effectively anticipating the *Mitsubishi* test for arbitrability, the Court acknowledged the limitations on its authority under the Labor Management Relations Act at the motion-to-compel stage:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. Even under a contrary rule, a court could deny arbitration only if it could confidently be said not only that a claim is strictly 'procedural,' and therefore within the purview of the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify an arbitral award." 376 U.S., at 557-58.

"having made the bargain to arbitrate" their RICO claims, would "be held to their bargain").[12]

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), confirms that there is no need for a district court to conduct prearbitration review of available remedies. On postarbitration review, the Court examined a lower court decision vacating in part an arbitration award that included punitive damages. The Court substantively reviewed the respondents' claims that the arbitration panel had no authority to award punitive damages because the underlying contract was governed by New York law, which did not permit arbitrators to award punitive damages, and ultimately decided that the award "should have been enforced as within the scope of the contract." *Id.*, at 64. Because the Court's review occurred at the *postarbitration* stage, the Court had the benefit of knowing not only the arbitrators' views on the matter, but also that the issue was ripe because the arbitrators had in fact awarded punitive damages. *See id.*, at 54-55. The key to *Mastrobuono*, and what harmonizes it with *Mitsubishi* and other prearbitration cases, is that the Court was conducting the postarbitration inquiry contemplated by §10, rather than the limited arbitrability review authorized by §§2 and 4.

The Court has emphasized that postarbitration judicial review under §§10-11 is sufficient to ensure that arbitral decisions effectively vindicate rights available under statutes, such as RICO, that create arbitrable claims.[13] *See Gilmer*,

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[12] The district court's pre-evaluation of what would have happened during an arbitration is particularly troubling because the respondents in this case have disclaimed to petitioners, the district court, and the court of appeals any intention of arbitrating any claim that is sent to arbitration. R.1244.1; R.1272.4-5; R.1637.1-2; Appellees' Response to Motion for Stay of Proceedings, at 17-18 (5/21/2001).

[13] Respondents incorrectly argued that the second part of the court's motion-to-compel inquiry is more general: to determine "whether [*any*]

500 U.S., at 32 n.4; *McMahon*, 482 U.S., at 232 (noting that judicial review in accordance with the FAA is "sufficient to ensure that the arbitrators comply with the requirements of the statute"). Adequate postarbitration review would be available in this case. If the arbitrator concludes that the arbitration agreements preclude an award of RICO treble damages, then the district court could properly address during award-enforcement proceedings whether that result violates a cognizable public policy—with the benefit of the arbitrator's determination on the merits of respondents' RICO claims.[14] Courts have been willing to invalidate an award when the arbitrator has plainly failed to vindicate a party's statutory rights.[15] But the district court in this case formulated its own

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legal constraints external to the parties' agreement [to arbitrate] foreclosed the arbitration of those claims," and argued that this language justified the court's review of the damage limitation provisions. Brief in Opposition to Petition for Writ of Certiorari, at 7. That reading improperly attempts to expand the *Mitsubishi* test by substituting any external "constraint" for the sole focus of the Court's review: whether there was evidence that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S., at 628; *see Green Tree*, 531 U.S., at 90; *Gilmer*, 500 U.S., at 26; *McMahon*, 482 U.S., at 227.

[14] The courts of appeals have articulated several grounds—including the violation of public policy and the manifest disregard of the law—that would permit a district court to subsequently vacate an arbitration award. *See Wonderland Greyhound Park, Inc.* v. *Autotote Sys., Inc.*, 274 F.3d 34, 35-36 (CA1 2002); *Sheldon* v. *Vermonty*, 269 F.3d 1202, 1206 (CA10 2001); *DBM Tech., Inc.* v. *Local 227, United Food & Commercial Workers Int'l Union*, 257 F.3d 651, 659-60 (CA6 2001); *LaPrade* v. *Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (CADC 2001); *Greenberg* v. *Bear, Stearns & Co.*, 220 F.3d 22, 27 (CA2 2000); *Williams* v. *Cigna Fin. Advisors Inc.*, 197 F.3d 752, 757-61 (CA5 1999); *Scott* v. *Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (CA11 1998).

[15] *See, e.g.*, *Halligan* v. *Piper Jaffray, Inc.*, 148 F.3d 197, 204 (CA2 1998) (vacating an arbitral award when arbitrators showed manifest disregard for the law in denying a claim for damages under the Age Discrimination in Employment Act); *Montes* v. *Shearson Lehman Bros.*,

interpretation of the damage limitation provisions and then proceeded to hold that the provisions, as interpreted, violated public policy, all before any arbitration made the issues ripe for judicial review.[16]

Allowing a court to usurp the arbitrator's role in performing the merits review also creates an unacceptable risk of gamesmanship and strategically motivated objections. Before arbitration, §4 authorizes judicial intervention only when a party allegedly "fail[s], neglect[s], or refus[es]" to arbitrate. In the absence of a failure or refusal to arbitrate, the dispute proceeds directly to the arbitral forum and judicial review occurs, if at all, only after the arbitration is completed. Parties who willingly comply with a valid arbitration agreement get exactly what they bargained for—contractual interpretation and dispute resolution by the arbitrator. *See W.R. Grace*, 461 U.S., at 764-65. Allowing a party to obtain substantive judicial review simply by interposing an objection to arbitration turns the congressional policy favoring enforcement of arbitration agreements on its head by providing parties to valid arbitration agreements with a

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Inc., 128 F.3d 1456, 1464 (CA11 1997) (reversing district court's affirmance of arbitration award on the basis that it manifestly disregarded the law of Fair Labor Standards Act).

[16] Even if the district court were permitted to reach the issue whether a waiver of RICO treble damages violated public policy, and even if the court were correct that a waiver does violate public policy, that determination should not have absolved respondents of their obligation to arbitrate their RICO claims. If the arbitrator were to enter an award for a RICO violation without having trebled the amount of compensatory damages, on postarbitration review the district court, if required, could easily vacate the award or modify it to comply with RICO by performing a simple mathematical computation. *See, e.g., Nat'l Post Office Mailhandlers, Watchmen, Messengers and Group Leaders Div., Laborers Int'l Union of N. Am., AFL-CIO* v. *United States Postal Serv.*, 751 F.2d 834, 844-45 (CA6 1985) (directing district court on remand to enter judgment modifying arbitration award to include back pay).

perverse incentive to breach their agreements to arbitrate. The party who decides, in hindsight, that it prefers litigation to arbitration gets precisely what it contractually agreed to waive, and the other party to the arbitration agreement is denied the benefit of its bargain. Parties should be held to their predispute bargain to arbitrate even when, after a dispute arises, they may regret their agreement to submit to an arbitral forum. *See First Options*, 514 U.S., at 942; *McMahon*, 482 U.S., at 242; *Prima Paint*, 388 U.S., at 404.

A number of circuits have addressed whether the validity of a limitation on remedies in an arbitration clause should be addressed by the district court or the arbitrator in the first instance and have concluded, in line with the Court's precedent, that the decision should be made by the arbitrator in the first instance. *See Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 n.6 (CA7 2002); *Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 91-92 (CA1 2002); *Metro E. Ctr. for Conditioning & Health* v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924, 929 (CA7 2002); *Arkcom Digital Corp.* v. *Xerox Corp.*, 289 F.3d 536, 539 (CA8 2002); *Larry's United Super, Inc.* v. *Werries*, 253 F.3d 1083, 1086 (CA8 2001); *MCI Telecommunications Corp.* v. *Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (CA1 1998); *Great W. Mortgage Corp.* v. *Peacock*, 110 F.3d 222, 228, 232 (CA3 1997); *but see Inv. Partners, LLP* v. *Glamour Shots Lic., Inc.*, 298 F.3d 314, 316 (CA5 2002); *In re Humana Managed Care Litig.*, 285 F.3d, at 973-74 & n.3; *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (CA9 1995).

The district court could not justifiably rely on the Eleventh Circuit's *Paladino* decision because the court in that case impermissibly decided issues that should have been left to the arbitrator in the first instance, *i.e.*, when it held that it could deny arbitration if the relief available in arbitration was not "sufficiently meaningful." *See Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (CA11 1998). The district

court's evaluation in this case whether respondents could obtain "meaningful relief" in their prospective arbitrations similarly ran afoul of the limitations of §2, usurped the role of the arbitrator, deprived the parties of the benefit of their bargain, exhibited improper distrust for the arbitral process, and failed to recognize the adequacy of postarbitration review. Rather than attempting to determine whether the arbitration agreement provided "meaningful relief" at the motion-to-compel stage—an analysis that should have been foreclosed by *Mitsubishi*, *McMahon*, *John Wiley & Sons*, and *Gilmer*—the district court should have simply sought to determine whether the arbitration agreement itself was revocable under §2 and then compelled arbitration of the RICO claims.[17]

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[17] The district court also refused to compel arbitration of Dr. Kelly's ERISA claims, unjust enrichment claims, and claims for violation of state prompt pay laws because of a provision in his arbitration agreement that required arbitration to be commenced within one year after either party notifies the other in writing of a dispute. *See In re Managed Care Litig.*, 132 F.Supp.2d, at 1001. The district court improperly construed this diligent-prosecution requirement as an impermissible "one year statute of limitations" on Dr. Kelly's claims that excused him from arbitrating his ERISA and other statutory claims, *see id.*, although the court also inconsistently stated that it was "not persuaded that the statute of limitations provision is a strong enough factor, on its own, to overcome the FAA's strong presumption in favor of arbitration," and ordered arbitration of Kelly's contractual claims. *Id.* Apparently recognizing this impropriety, the district court later issued an order to Dr. Kelly to show cause why the district court should not reverse its position and compel Dr. Kelly to arbitrate his state prompt pay claims. R.1199.3-5. Assuming, *arguendo*, that Dr. Kelly's arbitration agreement did contain an impermissible one-year statute of limitations provision on claims brought in arbitration, the district court should have compelled Dr. Kelly to arbitrate his ERISA, unjust enrichment, and state prompt pay claims for the very same reasons that it should have ordered arbitration of the RICO claims. Once the district court determined that Dr. Kelly entered into an agreement to arbitrate ERISA, unjust enrichment, and state prompt pay claims, and further determined that the ERISA statute did not preclude a

II. THE DAMAGE LIMITATION PROVISIONS COULD NOT JUSTIFY EXCUSING RESPONDENTS FROM ARBITRATING THEIR RICO CLAIMS.

Even if the district court could have properly reviewed the validity of the restriction on punitive damages found in the physicians' respective arbitration agreements, the court still erred in its interpretation and application of the provisions. In ruling that respondents' RICO claims were exempt from arbitration, the district court first interpreted the provisions limiting punitive damages strictly to prohibit treble damages under RICO, held that the provisions would not allow for meaningful relief in the arbitration, and then declared that the entire arbitration agreement would not be enforced in connection with the physicians' RICO claims. *See In re Managed Care Litig.*, 143 F.Supp.2d, at 1375; *In re Managed Care Litig.*, 132 F.Supp.2d, at 1000-01. With or without the damage limitation provisions, respondents can enforce their RICO rights in arbitration, and the RICO claims should have been sent to arbitration.

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waiver of judicial rights, then the district court should have compelled these claims to arbitration, leaving to the arbitrator to decide in the first instance whether Dr. Kelly's arbitration agreement contained an impermissible one-year statute of limitations. Subsequent to the district court's refusal to compel arbitration of Dr. Kelly's unjust enrichment claim, respondents attempted to waive this claim, and requested the court of appeals to stay the unjust enrichment claim. *See* Appellees' Consolidated Reply Brief, at 34 n.9 (6/4/2001). The court of appeals did not stay the unjust enrichment claim and it improperly refused to compel Dr. Kelly to arbitrate his unjust enrichment claim. *See In re Humana Managed Care Litig.*, 285 F.3d, at 973-74.

A. A Limitation on Punitive Damages Does Not Prevent an Award of RICO Treble Damages.

The lower courts refused to compel arbitration of respondents' RICO claims because they incorrectly construed the language in the arbitration agreements restricting the arbitrator's ability to award "punitive" damages as encompassing RICO treble damages. But the district court's determination that RICO treble damages are "a form of punitive damages," *id.*, at 1001, does not accurately reflect the purposes of RICO treble damages and should not have served as a basis for disregarding both the damage limitation and the agreement to arbitrate itself (at least as to the RICO claims). Statutory treble damages are not themselves punitive damages in the ordinary sense of the term, and RICO legislative history and the substantial differences between statutory treble damages and traditional punitive damages confirm that RICO treble damages should not be considered "punitive damages" within the context of the arbitration agreements. Even if there were some uncertainty about how the term should be interpreted, that uncertainty should have been resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24-25 (obligating district courts to resolve "any doubts concerning the scope of arbitral issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"); *see also Volt*, 489 U.S., at 476 (same).[18]

The term "punitive damages" that appears in the arbitration agreements is a familiar term that generally describes a category of common-law damages independently awarded to

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[18] That is particularly true in light of United's concession below that—because United does not believe that RICO treble damages are punitive damages—it would not assert the damage limitation provisions to bar an award of RICO treble damages in arbitration. R.582.14-16.

punish a defendant for its conduct. *See Molzof* v. *United States*, 502 U.S. 301, 306 (1992) ("'Punitive damages' is a legal term of art that has a widely accepted common-law meaning."). Treble damages, on the other hand, are a statutorily created category of damages that serve disparate purposes and whose nature and practice differ significantly from common-law punitive damages. *See Inv. Partners,* 298 F.3d, at 317. RICO treble damages are not within the common-law meaning of the term of art "punitive damages." *See Molzof*, 502 U.S., at 306.

Moreover, multiple damages provisions in federal statutes are also distinguishable from punitive damages because they are not enacted primarily for punitive purposes. *See* BLACK'S LAW DICTIONARY, definition of "MULTIPLE DAMAGES" (7th ed. 1999) (citing DAN B. DOBBS, LAW OF REMEDIES §3.12, at 359 (2d ed. 1993)) ("[M]ultiple damages statutes may be enacted for entirely non-punitive purposes."). That is true of RICO treble damages. *See Liquid Air Corp.* v. *Rogers*, 834 F.2d 1297, 1310 n.8 (CA7 1987) ("Although there is some sense in which RICO treble damages are punitive, they are largely compensatory in the special sense that they ensure that wrongs will be redressed in light of the recognized difficulties of itemizing damages."); *accord Aetna Cas. Sur. Co.* v. *P&B Autobody*, 43 F.3d 1546, 1572 (CA1 1994) ("It may reasonably be argued . . . that RICO damages are primarily compensatory in nature."); *see also Carter* v. *Berger*, 777 F.2d 1173, 1175-76 (CA7 1985).

Indeed, it is clear from the legislative history of RICO's treble damages provision—on which the Court relied in *McMahon*—that it was enacted for "non-punitive purposes" and should not have been defined as punitive damages in interpreting the arbitration agreements. In *McMahon*, the Court observed that the legislative history of §1964(c) reveals an "emphasis on the remedial role of the treble damages provision." 482 U.S., at 241. "This focus on the remedial

function of §1964(c)," the Court added, "is reinforced by the recurrent references in the legislative debates to §4 of the Clayton Act as the model for the RICO treble-damages provision." *Id.*, at 241 (citing 116 CONG. REC. 35,346); *see also* S. REP. NO. 91-617, at 81-82 (1969) (stating that RICO was not intended "to visit punishment on any individual" or to be "penal"); Judith A. Morse, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 547 (1986) ("Congress intended treble damages not as a means for punishing the defendant, but as a remedy for the plaintiff."). The legislative history was cited in *McMahon*, along with an analogy to the antitrust laws, in support of what the Court called "the priority of the compensatory function of [the treble damages provision] over its deterrent function." *McMahon*, 482 U.S., at 240.

Without strong evidence that Congress actually enacted RICO treble damages primarily as a form of punitive damages, it was improper for the district court simply to assume that it was so for the purpose of holding that the provision could not properly be applied to respondents' RICO claims, especially when that conclusion then formed the basis for releasing respondents from their obligation to arbitrate their RICO claims altogether. Even if the Court were to determine that RICO treble damages have a punitive component, as the Court has done in some other treble damages contexts,[19] "they are not 'punitive' for purposes of interpreting the scope of an arbitration clause." *Inv. Partners*, 298 F.3d, at 318 (holding that "the prohibition in the parties' arbitration agreement against awarding 'punitive damages' does not extend to statutory treble damages").

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[19] *See, e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785-86 (2000) (stating that the treble damages and civil penalties authorized by the False Claims Act are "essentially punitive in nature").

Although the district court in this case recognized the Court's rulings requiring that arbitration agreements be construed generously in favor of arbitration, *see In re Managed Care Litig.*, 132 F.Supp.2d., at 993 (*citing Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24; *Mitsubishi*, 473 U.S., at 625-26), it nevertheless interpreted the term "punitive damages" in the arbitration agreements unnecessarily broadly in order to bar arbitration. Given this Court's recognition of Congress's strong expression that RICO treble damages are not primarily punitive and the inherent differences between RICO's statutory treble damages and punitive damages, at the very least there are serious doubts regarding whether RICO treble damages should be considered "punitive damages" within the scope of the arbitration agreements. Those doubts should have required the lower courts to interpret the damage limitation provisions in the arbitration agreements so as to preserve the parties' agreement to arbitrate their disputes. *See Warrior & Gulf Nav. Co.*, 363 U.S., at 582-83 (stating that a dispute should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

B. The Limitation on "Extracontractual Damages" in Dr. Porth's Arbitration Agreement Does Not Impermissibly Limit RICO Treble Damages.

The district court refused to compel arbitration of Dr. Porth's RICO claims after concluding that he could not recover RICO treble damages in arbitration because his arbitration agreement prohibits the arbitrator from awarding "extracontractual damages, including punitive or exemplary damages." *See In re Managed Care Litig.*, 132 F.Supp.2d, at 1000. The court erred, however, in reading the "extracontractual damages" limitation as a general bar on any damages other than for breach of contract, rather than a

specific limitation on breach-of-contract damages. The limitation on "extracontractual damages" serves merely as a limit on the arbitrator's ability to award non-economic damages, such as punitive damages, and would not, for the reasons stated above, bar an award of RICO treble damages. *See* DAN B. DOBBS, LAW OF REMEDIES §12.1(1), at 753 (2d. ed. 1993) ("Punitive damages and mental anguish damages are thus considered 'extracontractual,' and usually denied in pure contract cases."); *Barnes* v. *Gorman*, 122 S.Ct. 2097, 2102 (2002) ("punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract").[20]

The limitation on extracontractual damages does not prevent Dr. Porth from asserting claims against United in arbitration; it merely represents the parties' mutual agreement to limit any damages to expectancy-type damages under their contractual relationship. Again, the parties were entitled to arrange their contractual affairs as they saw fit, and the courts should not, in the absence of express congressional intent, bar the application of an express waiver of statutory rights.

C. The Damage Limitation Provisions Are an Enforceable Part of the Parties' Contractual Agreements.

Even if the Court determines that the damage limitation provisions in the arbitration agreements must be interpreted

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[20] The lower courts concluded that this "prohibition on extracontractual damages is precisely the type of arbitration agreement that was found unenforceable in *Paladino*." *In re Managed Care Litig.*, 132 F.Supp.2d, at 1000. In fact, the *Paladino* arbitration clause was dramatically different because it authorized the arbitrator "to award damages for breach of contract only," *see Paladino*, 134 F.3d, at 1056, and thus was interpreted to restrict the party to a single cause of action. Dr. Porth's arbitration agreement, by contrast, merely limits him to expectancy-type damages and bars punitive damages, but does not limit the kinds of claims Dr. Porth could assert against United.

as a bar to RICO treble damages, that limitation was valid and enforceable and could not justify releasing respondents from their obligation to arbitrate their disputes with petitioners. As sophisticated actors,[21] respondents were free to contract and structure their arbitration agreements according to their business needs, including a mutual waiver of punitive damages. Physicians may find themselves facing the possibility of an award of punitive damages when they are accused of submitting fraudulent claims, and it was eminently reasonable for both parties to bilaterally agree to waive the right to assert punitive damages in arbitration. Prior to *Mastrobuono*, several circuits permitted parties to contractually waive punitive damages and have subsequently relied on *Mastrobuono* to support that conclusion. *See, e.g., Inv. Partners*, 298 F.3d, at 318 n.1 (finding that "[p]rovisions in arbitration agreements that prohibit punitive damages are generally enforceable") (citing *Mastrobuono*, 514 U.S., at 56-57); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 939-40 (CA10 2001); *Long* v. *Silver*, 248 F.3d 309, 319 (CA4 2001); *MCI Telecommunications Corp.* v. *Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (CA1 1998); *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709-10 (CA7 1994); *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (CA1 1989); *Surman* v. *Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (CA8 1984).[22]

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[21] The district court expressly found as a factual matter that the parties to this dispute are sophisticated actors. *See In re Managed Care Litig.*, 132 F.Supp.2d, at 998.

[22] A few state courts have at least arguably indicated a contrary view. As of the date of filing of this brief, at least one petition is pending before the Court seeking to resolve a claimed conflict between the near-uniform view of the federal courts that waivers of punitive damages are enforceable and the contrary view of a state court. *See Friedman's Inc.* v. *West Virginia ex rel. Dunlap*, No. 02-315, 71 U.S.L.W. 3163 (filed Aug. 27, 2002).

The Court has repeatedly emphasized the presumption that parties may voluntarily waive constitutional[23] and statutory[24] rights and remedies by agreement.[25] *See New York* v. *Hill*, 528 U.S. 110, 114 (2000) ("We have . . . in the context of a broad array of constitutional and statutory provisions, articulated a general rule that presumes the availability of waiver . . . .") (internal quotation marks omitted); *United States* v. *Mezzanatto*, 513 U.S. 196, 200-01 (1995) (stating that "[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption") (citing *Shutte* v. *Thompson*, 82 U.S. 151, 159 (1872) (providing that "a party may waive any provision, either of a contract or of a statute, intended for his benefit")). Without an affirmative indication

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[23] In *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), the Court stated that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *See, e.g., Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-49 (1973) (holding that a person may consent to an unreasonable search and seizure); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (permitting waiver of right to jury trial, right of confrontation, and privilege against self-incrimination); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938) (holding that a person may waive right to counsel).

[24] *See, e.g., NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (providing that "a union may even bargain away [the employee's] right to strike during the contract term, and his right to refuse to cross a lawful picket line"); *United States* v. *Khattak*, 273 F.3d 557, 561 (CA3 2001) (validating a waiver of appeal under 18 U.S.C. §3742 (1994), and stating that "[t]he ability to waive statutory rights . . . logically flows from the ability to waive constitutional rights").

[25] Due process rights to notice and hearing prior to civil judgment are also subject to waiver. *See D.H. Overmeyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972) (quoting *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-16 (1964)) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.") (alteration in original).

of congressional intent to the contrary, "statutory provisions are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 513 U.S., at 201.

These principles apply with equal force to arbitration agreements, given Congress's and the Court's emphasis on giving full effect to the parties' intent. *See Volt*, 489 U.S., at 479 ("Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."); *Davis* v. *Prudential Sec., Inc.*, 59 F.3d 1186, 1193 (CA11 1995) ("[A]n agreement to arbitrate is equivalent to voluntarily entering into a contract, the terms of which the parties are free to specify.") (citing *Baravati,* 28 F.3d, at 709) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."). And, "[h]aving made the bargain to arbitrate, . . . part[ies] should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S., at 628.

When congressional intent to preclude waiver is not made abundantly clear, the Court has allowed parties to waive statutory rights and remedies. In *Evans* v. *Jeff D.*, 475 U.S. 717, 719-20 (1986), the respondents contested the waiver of a statutory eligibility for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 contained in a settlement agreement. The Court found no support in the Act's text or legislative history to preclude waiver, but did explain its findings:

> "[N]owhere [does the legislative history] suggest that Congress intended to forbid all waivers of attorney's fees . . . . Congress . . . neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available." *Id.*, at 731-32 (citing S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5912).

The Court has invalidated waivers of statutory rights and remedies only in narrow circumstances when Congress has clearly demonstrated an intent, most often in the statute's text or legislative history, to forbid waivers. *See, e.g., Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 426-28 (1998) (invalidating waiver of Age Discrimination in Employment Act claims when signed waiver failed to conform with the specific requirements of the Older Workers Benefit Protection Act). In the RICO context, however, no congressional policy demands invalidation of a waiver of treble damages agreed to by sophisticated parties. Congress has not expressed any intent to prevent waiver of RICO treble damages, and respondents were not coerced or subjected to any improper disadvantage. To the contrary, nothing in either the text or the legislative history of RICO, including its treble damages provision, provides any basis to suggest that individuals cannot agree to waive its remedies.

If anything, the legislative history of the RICO treble damages provision in particular supports the conclusion that waiver would *not* thwart any articulated legislative policy. The treble damages provision was added late in the legislative process without extensive deliberation, and the version of the bill that passed the Senate, S. 30, was limited to injunctive remedies and did not contain the treble damages provision. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985); 116 CONG. REC. 972 (1970). The Senate had rejected earlier versions of the bill that did contain the treble damages provision in identical form. *See Sedima*, 473 U.S., at 487 (citing S. 1623, 91st Cong., 1st Sess., §4(a) (1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967)). The treble damages provision now contained in §1964(c) was added to S. 30 in the House relatively late in the legislative process on the

recommendation of the American Bar Association. *See Organized Crime Control Act: Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2nd Sess., at 543-44 (1970) (seeking to add "an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act"). Following the passage of S.30 as amended in the House, *see* 116 CONG. REC. 35,363-64 (1970), the Senate adopted the bill that contained the treble damages provision without seeking a conference. *See Sedima*, 473 U.S., at 488 (citing 116 CONG. REC. 36,296 (1970)). In all of these proceedings, there is no mention whatsoever of any effort to preclude the waiver of any remedies under RICO.

Recognizing the absence of any congressional intent to preclude waiver of RICO treble damages, the courts of appeals have uniformly enforced arbitration clauses with forum selection clauses that effectively waived recovery of RICO treble damages by agreeing to resolve their claims in countries without similar RICO laws. *See Roby* v. *Corp. of Lloyd's*, 996 F.2d 1353, 1366 (CA2 1993) ("That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the [plaintiffs'] contract clauses must be enforced."); *Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 n.20 (CA11 1998); *Richards* v. *Lloyd's of London*, 135 F.3d 1289, 1296 (CA9 1998) (en banc); *Bonny* v. *Soc'y of Lloyd's*, 3 F.3d 156, 159-61 (CA7 1993).

The arbitration agreements addressed in *Roby* and the related cases represented a sweeping waiver of all RICO remedies, yet the courts nevertheless held that private parties could voluntarily waive their right to any RICO remedies. As sophisticated commercial actors, the parties in this case were free to determine what remedies would potentially be available in arbitration. Because the damage limitation

provisions in this case are far less expansive and potentially apply only to RICO treble damages, respondents will still be able to pursue RICO causes of action in arbitration and, if they prevail, recover "the damages [they] sustain[ed] and the cost of the suit, including a reasonable attorney's fee," under §1964(c). If the parties' arbitration agreements must be construed to bar an award of RICO treble damages in arbitration, then it necessarily follows that the parties reasonably and properly agreed that untrebled compensatory damages would be adequate in arbitration.[26]

By invalidating the parties' contractual damage limitation provisions and holding the arbitration agreements unenforceable as to respondents' RICO claims, the lower courts improperly overreached their authority to review arbitration agreements and contradicted not only congressional intent establishing a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24, but also the ability of parties to

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[26] The Court has remarked that, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S., at 26 (quoting *Mitsubishi*, 473 U.S., at 628); *accord Waffle House*, 534 U.S., at 295-96 n.10. A party may agree to limit statutory remedies as part of a valid agreement to arbitrate, and a party who does so still enjoys the statute's substantive protections. The Eleventh Circuit's contrary rule, that "the arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies," *Paladino*, 134 F.3d, at 1062, would require a special exception in the arbitration context to the rule that parties may validly contract to relinquish statutory rights. Such an arbitration-specific exception would be wholly anomalous given that "parties are generally free to structure their arbitration agreements as they see fit" under the FAA, *Volt*, 489 U.S., at 479, and the exception would offend the most basic objective of the FAA—"to place '[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs.'" *Southland Corp.*, 465 U.S., at 16 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

contract freely (both to resolve disputes in arbitration and to waive statutory protections). *See Hill*, 528 U.S., at 114; *Volt*, 489 U.S., at 479.[27]

D. Even if the Damage Limitation Provisions Are Unenforceable, Respondents' RICO Claims Were Still Arbitrable.

Finally, even if the district court could correctly review the damage limitation provisions of the arbitration agreements and correctly ruled that the parties could not agree to waive RICO treble damages in arbitration, the court still should not have excused respondents from arbitrating their RICO claims. By doing so, the district court strongly contradicted the federal policy favoring arbitration established by §2. *See Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements. . . .").

If the district court believed that the damage limitation provisions could not be applied to respondents' RICO claims, the court could have easily enforced the arbitration agreements without any limitation on respondents' claims for treble damages under RICO. Both Dr. Porth's and Dr. Kelly's arbitration agreements expressly provide that the arbitrator "shall be bound by controlling law." J.A.168, 212. Dr. Book's and Dr. Breen's agreements similarly state that "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning." J.A.84, 146. If RICO is interpreted to categorically prohibit any contractual waiver of treble

[27] Respondents also have alleged in their complaint that petitioners are civilly liable under 18 U.S.C. §2 because they aided and abetted violations of RICO. The question of whether a private party can waive rights under 18 U.S.C. §2 is simple: A private party cannot enforce 18 U.S.C. §2 in a civil proceeding, *see Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 190-91 (1994), so nothing in that statute, its legislative history, or its purpose could restrict a private party's waiver of its provisions.

damages claims, then an arbitrator would be bound to apply that law even in the face of the parties' agreement to the contrary. Thus, notwithstanding the parties' damage limitation provisions, the arbitrator would be not only empowered but actually *required* to award treble damages if RICO liability is established. In light of this obligation, there was no justification for undermining the parties' agreement to arbitrate respondents' RICO claims, *or* for assuming that the arbitrator would not properly apply controlling law.

In any event, even if the district court believed that the damage limitation provisions were unenforceable against respondents' RICO claims, the court should have enforced the remainder of the parties' arbitration agreement because the clauses could have been severed from the arbitration agreements without rendering the agreements meaningless. *See, e.g.*, *Gannon* v. *Circuit City Stores, Inc.*, 262 F.3d 677, 682 (CA8 2001) ("[I]f we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract. Such an outcome would represent the antithesis of the 'liberal policy favoring arbitration agreements.'") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24); *Quiller* v. *Barclays American/Credit, Inc.*, 764 F.2d 1400, 1402 (CA11 1985) (provisions of contract held to be contrary to federal regulations severable if contract would not be rendered meaningless); *Vineberg* v. *Brunswick Corp.*, 391 F.2d 184, 186 (CA5 1968) (stating that it is a "well known principle of contract law that an illegal contract provision, or one contrary to public policy, when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless"). In the arbitration context, courts have severed provisions from arbitration agreements that

otherwise would have rendered the agreement unenforceable. *See, e.g.*, *Herrington* v. *Union Planters Bank, N.A.*, 113 F.Supp.2d 1026, 1033 (S.D. Miss. 2000) (citing *Jones* v. *Fujitsu Network Communications, Inc.*, 81 F.Supp.2d 688, 693 (N.D. Tex. 1999)).

The essential terms of the arbitration agreements demonstrate the desire and intent of the parties to arbitrate all disputes arising out of their "business relationship" or "agreement." J.A.84, 106, 146, 168, 212. The inclusion of the damage limitation provisions clearly was ancillary to the primary intent of the parties to submit all disputes to arbitration and to avail themselves of the significant benefits of the arbitration forum. *See Coddington Enters., Inc.* v. *Werries*, 54 F.Supp.2d 938, 940 (N.D. Mo. 1999) (citing *Zechman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990) ("to the extent the court can infer that the essential term of the provision is the agreement to arbitrate, that agreement will be enforced despite the failure of one of the terms of the bargain")).

If the damage limitation provisions could not be validly applied to respondents' RICO treble damages claims, then severance of offending provisions would have been the best, and perhaps the only, way to reconcile the parties' agreement to arbitrate with the strong federal policy favoring enforcement of arbitration agreements. *See Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24-25 ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Respondents have not asserted, and could not assert, that they would not have agreed to an arbitration agreement without a damage limitation provision. *See Gannon*, 262 F.3d, at 682-83 (severing a provision limiting punitive damages from an otherwise enforceable arbitration agreement because the severance did not affect the party's contractual intent to arbitrate and "excluding the provision only allows her the

opportunity to arbitrate her claims under more favorable terms than those to which she agreed"). The parties clearly intended to arbitrate all disputes arising out of their business or contractual relationships, and the district court's refusal to enforce the arbitration agreements at issue seriously undermines the important federal policy underlying the FAA.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

9 U.S.C. §2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform

the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. §10:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means.

(2) where there was evident partiality or corruption in the arbitrators, or either of them.

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. §11:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

18 U.S.C. §1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains . . . .